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RAILROAD AID BONDS IN THE SUPREME COURT OF THE UNITED STATES.

THE history of railroad bond litigation in the Federal Supreme Court is remarkable in more respects than one. That august tribunal begun by constituting itself the guardian of the peoples' rights and of the public credit, and in administering this self-imposed trust, "it has upheld and protected the rights of such creditors (bondholders) with a firm hand, disregarding at times, it would seem, principles which it applied in other cases, and asserting the jurisdiction and authority of the Federal courts with such striking energy and vigor, as apparently, if not actually, to trench upon the lawful rights of the states and the acknowledged powers of the state tribunals:" (Dillon Mun. Corp., sect. 416, page 403.) While professing to be "not unmindful of the importance of uniformity" in its decisions, "and those of the highest local courts giving constructions to the laws and constitutions of their own states," and admitting "that it is the settled rule of this court in such cases to follow the decisions of the state courts," it nevertheless claims that "there have been heretofore in the judicial history of this court, as doubtless there will be hereafter, many exceptional cases," and adds, "we shall never immolate truth, justice and the law, because a state tribunal has erected the altar and decreed the sacrifice:" *Gelpcke* v. *City of Dubuque*, 1 Wall. 206.

Two opinions to the same point, within a few months of each other, have recently illustrated these "exceptional cases." We allude to *Harshman* v. *Bates County*, 2 Otto 569, and *County of Cass* v. *Johnson*, decided at the present term of the court.

It might be sufficient for the purpose of this article to indicate the singular and extraordinary inconsistency of "incidentally" holding a state law unconstitutional and afterwards holding the exact reverse; but we will also attempt to show that the last decision does not follow the decisions of the state court on this point.

I. And first as to these township aid bond cases from the state of Missouri. In the case of *Harshman* v. *Bates County*, the case was thus: An action was brought by Harshman to recover the amount due on certain coupons attached to bonds of Bates county, Missouri, issued by Mount Pleasant township, in said county, in payment of a subscription in behalf of the township, to the capital stock of the Lexington Lake and Gulf Railroad Company. The subscription was made under a law of Missouri, called the Township Aid Act, passed in 1868, by which, on the application of twenty-five tax-payers and residents of any township for election purposes in any county, the county court may order an election to be held in such township to determine whether and on what terms a subscription to any railroad to be built in or near the township shall be made; and if two-thirds of the qualified voters of the township voting at such election are in favor of the subscription the county court shall make it in behalf of the township, and if bonds are proposed to pay the subscription, the court shall issue such bonds in the name of the county, but to be provided for by the township.

The constitution of Missouri (adopted in 1865) declares "that the General Assembly shall not authorize any county, city or town to become a stockholder in, or to loan its credit to, any company, association or corporation, unless two-thirds of the qualified voters of such county, city or town, at a regular or special election, to be held therein, shall assent thereto." It may also be stated that subsequently to the voting of the subscription by the township, and before the making of it by the county court in behalf of the township, the former company became consolidated with another, thereby forming a third, to whose stock the subscription was made. It was held by the Supreme Court of the United States, in this case, as follows:

1. That the "Township Aid Act" (of 1868) was unconstitu-

tional on the ground that it authorized a subscription if two-thirds of the qualified voters of the township *voting at each election* are in favor of the subscription; whereas the constitution (of 1865) required that two-thirds of the qualified voters of such county, city, or town, at a regular or special election to be held therein, shall assent thereto.

2. That the vote of the township was the vote of the county, as being a part of it, for the purposes of a valid subscription.

3. That the authority [attempted to be] conferred by the vote of subscription by the township remaining unexecuted at the time of the extinction of the company [by consolidation with another] was revoked by such extinction, and the power to subscribe [by the county court] was extinguished.

4. As sufficient notice of these objections is contained in the recitals of the bonds themselves to put the holder on inquiry, there was no error in the judgment of the Circuit Court of the United States [which was in favor of the county] and it is therefore affirmed.

It will be seen that the main ground of the decision is the unconstitutionality of the "Township Aid Act," for under the decision the consolidation of the company was immaterial, since the holding is that the subscription voted was invalid, because not conforming to the requirements of the constitution, and if the original company had remained in existence the result must necessarily have been the same. And so the decision was construed and accepted by bench and bar from the time of its promulgation (see Dillon's Law of Municipal Bonds, p. 44, n. 45).

The case of *Cass County* v. *Johnson*, decided at the present term, was thus: The facts are not stated in the opinion, but it appears that the bonds of the county were issued to a railroad company not incorporated until the day of voting the subscription, but was so incorporated before the issuing of the bonds by the county court, and the questions raised were, (1) The constitutionality of the law (Township Aid Act of 1868); (2) The non-incorporation before the day of election; and (3) The rendering of judgment against the county, and the manner of enforcing it, as declared by the lower court (Circuit Court of the United States). The case of *Harshman* v. *Bates County* was, of course, relied on as conclusive on the first point, *i. e.* the unconstitutionality of the law as to the vote. But the court held as follows:

1. That the Township Aid Act (of 1868) is constitutional (con-

sidering it to have been in effect so held in *State* v. *Linn County*, 44 Mo. 504, and therefore conclusive upon the question), and overruling *Harshman* v. *Bates County*, in so far as it declares the law (*i. e.* said Township Aid Act of 1868) unconstitutional.

2. That the bonds sued upon are not invalid because the railroad company to which the subscription was voted was not incorporated until the day of the election—it being sufficient that the company was incorporated when the subscription was made.

3. That a judgment may be rendered against the county (in case of a subscription voted by a township of said county) to be enforced if necessary, by mandamus against the county court, or the judges thereof, to compel the levy and collection of a tax in accordance with the provisions of the law under which the bonds were issued. The only difference between the two cases is that in the last the constitutionality of the Township Aid Act was directly presented—and in the first case it was suggested by the court *ex mero motu* and made the basis of its decision, and "incidentally" decided to be unconstitutional, but surely not without due consideration, for this court would hardly hold a state law unconstitutional without examining the decisions of said state even upon an "implied concession" to that effect.

It therefore appears clearly that the court, upon a careful and not an "incidental" examination of the law and of the decisions of the Supreme Court of Missouri construing it, *finally* came to the decision that the Missouri court had held the law constitutional —that this [assumed] holding was conclusive upon it (the Supreme Court of the United States), and that the act and bond were valid. It is proper to state that two of the ablest judges of the court (BRADLEY and MILLER) held to the contrary on these points, *i. e.* they held both the legislative act and the subscription were invalid; and also differed with the majority as to the effect of the Missouri cases bearing on the question.

II. It will now be attempted to show that this last decision (*Cass County* v. *Johnson*, does not follow the decisions of the Supreme Court of Missouri construing the law. In order to do this satisfactorily a brief review of the cases in the state court will be here made.

There are only two cases decided by the Supreme Court of Missouri bearing directly upon the main point in *Cass County* v. *Johnson*, that is to say—whether the requirements of the constitution,

that "two-thirds of the qualified voters of a county, city or town * * shall assent thereto," in order to authorize a subscription by the county court—is met by the provisions of the statute authorizing a subscription if two-thirds of the qualified voters * * voting at such election are in favor of the subscription; and these are directly opposed to the view of the court in the case last named; and in entire unison with the view promulgated in *Harshman* v. *Bates County*. These cases are *State* v. *Winkelmeier*, 35 Mo. 503, and *State* v. *Sutterfield*, 54 Id. 391.

State v. *Winkelmeier* was thus: Winkelmeier was indicted for selling liquor on Sunday. The evidence was that he sold beer, but did not sell distilled liquors. The legislature of Missouri had enacted "that the corporate authorities of the different cities in the county of St. Louis shall have the power, whenever a majority of the legal voters of the respective cities in said county authorize them to do so, to grant permission for the opening of any establishment * * within the corporate limits of said cities, for the sale of refreshments of any kind (distilled liquors excepted) on any day in the week." In accordance with this act, and subsequent to it, an election was held in St. Louis, in which more than 13,000 voters participated, and only 5035 voted in favor of giving the city authority to grant said permission, and 2001 persons voted against it. Winkelmeier relied on this supposed permission by the corporate authorities of St. Louis as a defence to the indictment. But the court held "that the act (of the legislature) expressly requires a majority of the legal voters—that is, of all the legal voters of the city, and not merely of all those who might at a particular time choose to vote upon the question." And what is further noticeable in this case is that in this election only 7036 votes were cast on the question of the granting of permission under the ordinance, of which number 5035 votes were in favor of it, and 2001 against it, showing a difference in favor of granting the permission of 3034 votes, and much more than a majority of the votes cast on that question. So that the court necessarily held on the facts as well as on the law that a majority of the persons voting was not sufficient to authorize the city authorities to grant the permission under the act of the legislature. In the case next referred to (*State* v. *Sutterfield*, 54 Mo. 391), this case is expressly referred to and approved, and two cases claimed to be inconsistent with it, and which are also cited in *Cass County* v. *Johnson*, in support of that decision (*Bassett* v.

The Mayor, &c., 37 Mo. 270, and *State* v. *Binder*, 38 Id. 450), are disposed of with the remark that these cases "were upon temporary acts of legislation, in which a construction either way was not of importance, as a subsequent legislature could readily do away with any inconvenience which might arise from incorrect or unacceptable construction."

The other case above referred to (*State* v. *Sutterfield*, 54 Mo. 391) is even stronger, and should be conclusive as to the construction of the constitutional provision. The case was this: Dobbins and three hundred other citizens of Reynolds county, Missouri, applied to the Circuit Court of that county for a mandamus on the county justices to appoint commissioners to select a site whereon to locate the seat of justice. To the writ, which was issued, the county court returned that at the general election held on 5th November 1872 the proposition to remove the seat of justice of Reynolds county from its present location did not receive "two-thirds of the legally registered votes of Reynolds county," nor were two-thirds of the legal votes of said county polled at said election, as appeared by the returns of said registration and election; that at a registration held for said county, within sixty days preceding the tenth day prior to said 5th November 1872, 694 voters legally registered in said county, and that the proposition to change the county seat received only 244 votes out of 694 legally registered voters, and out of 547 actually polled at said election. There was a further answer in the return on other points not material to be mentioned here. This return to the writ of mandamus made by the county court, on motion to strike it out and disregard it, was held insufficient (by the lower court), and a peremptory mandamus was awarded. To this judgment a writ of error was taken. It should also be stated that the constitution of Missouri then in force (art. 4, sect. 30) provided: "The General Assembly shall have no power to remove the county seat of any county, unless two-thirds of the qualified voters of the county, at a general election, shall vote in favor of such removal." And the statute on the subject (Wagner's St. 405, sect. 22), after providing for an election, enacts: "If it shall appear by such election that two-thirds of the legally registered voters of said county are in favor of the removal of the county seat, then the county court shall," &c. Upon this state of facts, and construing the constitution and statute provisions aforesaid, the Supreme Court of Missouri held as follows:

"It appears from the return of the county court to the mandamus, that the registration immediately prior to the election showed that there were in Reynolds county 694 voters; that 547 of these duly registered voters actually voted at the election, and only 244 voted for the removal of the county seat, and only 47 votes were cast against the removal. The county court decided that 244 was not two-thirds of 694, nor of 547, and as the constitution (and also the statute) required that two-thirds of the qualified voters should vote for such removal, refused to appoint commissioners or proceed further in the matter. The Circuit Court held that as 244 was two-thirds of 291—all the votes cast on the question of removal—the requisite constitutional majority was obtained."

"There is no doubt," continued the court, "that in general, where an election is held to determine the choice of a candidate, or the determination of some question of public policy, the plurality required by the law, whether it be a bare majority, or two-thirds, or three-fourths, is determined by the result of the vote cast, without regard to the number of voters declining to vote; and this is upon the ground that the failure to vote is assumed or may be presumed to be an acquiescence in whatever result may be produced by the action of those who felt sufficient interest in the election to go to the polls and vote; and for the further reason that, in most cases, there is no mode by which the number of absentees can be ascertained. The decision of Lord MANSFIELD, in *Rex* v. *Foxcroft*, 2 Burr. 1017, is therefore rightly followed in many cases in this country where it might properly be applied. But the decisions in England, or in other states, are very unsafe guides when we are called upon to construe a constitutional or statutory provision of our own state. If the language is plain and unambiguous, its requirements cannot be set at naught upon the strength of decisions elsewhere on statutes or constitutions essentially variant or couched in very different terms."

Further continuing, the court says: "Our constitution, in regard to the proposed removal of county seats, hardly admits of two constructions. It prohibits the legislature from removing them, unless two-thirds of the qualified voters shall, at a general election, vote for the removal. The words do not imply an acquiescence, or a negative sanction, or a negative assent inferred from absence, but a positive vote in the affirmative, and the number of votes required is specifically named, and there is no difficulty in

ascertaining what that number is, since the same constitution provides for a registration, and points out who the qualified voters are; and the statute in this case uses the words 'legally registered voters,' and requires two-thirds of them to vote for the change; and the return of the county court produces the registration, and shows that not one-half of the registered voters voted for the change, and not one-half of the voters who voted at the election voted for it. With what propriety then can it be said that two-thirds of the qualified voters voted for the change?"

Concluding the opinion on this point, and referring to *Bassett* v. *The Mayor, &c.*, 37 Mo. 270, and *The State* v. *Binder*, 38 Id. 450 (heretofore alluded to), which were claimed to maintain views conflicting with this opinion, the court says: "A reference to these cases will show that neither of them arose on the construction of a provision of the constitution, or on the subject-matter now under consideration. In neither of these cases was there any examination of or construction given to the precise language of the constitutional provision now under consideration." And the judgment of the circuit court was *reversed.*

It was therefore clearly held in this case:—

1. That the constitution prohibits the legislature from removing county seats, "unless two-thirds of the qualified voters shall, at a general election, vote for the removal," and that these words do not imply an acquiescence or a negative sanction, or a negative assent inferred from absence, but a positive vote in the affirmative.

2. That the general rule of determining an election by the result of the vote cast, applicable to the choice of a candidate or the determination of some question of public policy, does not apply in construing a constitutional or statutory provision whose language is plain and unambiguous.

3. That (applying these principles to the facts of this case) a vote of two-thirds voting on the question—not being two-thirds of the qualified voters—does not conform to the constitutional requirement.

It also appears that this case differs from *Cass Co.* v. *Johnson* in only one thing; that is to say, in this case the statute was in conformity to the constitution, and in the Cass county case the statute was inconsistent with and in disregard of the constitution. It also appears that the cases are precisely analogous in principle, and that if the Supreme Court of the United States had followed

the decision of the state court, as it professed to do, its judgment must have been the opposite of the one rendered. And it cannot be claimed that the decisions of other states, or of the Supreme Court of the United States itself, on the general subject of the construction of election laws, either constitutional or statutory, should have any weight, or even be considered in this case, or treated as relevant to it, since it is expressly admitted by that court, "that the decisions of this state construing their own law are conclusive upon us."

Not one of the Missouri cases cited by the Supreme Court of the United States in *Cass County* v. *Johnson* supports it in the position assumed as to the construction of the constitution and statute in question before the court. They are all cases either of temporary legislation or of construction of other constitutional provisions, or at least passing upon different grounds of objection than this, and in none of them was the constitutional question here raised in issue, or, as far as appears, considered by the court. It is true that this "Township Aid Act" was treated as constitutional, as all laws are in the absence of objection legally interposed, until the Supreme Court "incidentally" held to the contrary in *Harshman* v. *Bates County*; but never was it expressly construed or impliedly, *on this point*, in any case by the Supreme Court of Missouri.

The cases in 37 Mo. 270, and 38 Mo. 450, have already been referred to and disposed of by the case of *State* v. *Sutterfield*, 54 Mo. 391, which has just been presented somewhat at length.

Ranney v. *Baeder*, 50 Mo. 600, was an action in trespass against the sheriff and collector of Cape Girardeau county, who had coerced the payment of sixty-seven dollars from the plaintiff, being the amount of a special tax levied on his real estate in Cape Girardeau township, to pay off the accruing interest on certain railroad bonds issued by the county on behalf of the township. It was claimed the bonds were issued without authority of law, on the ground that no particular road was designated, either in the petition (for the ordering an election) or in the order of the court. (No objection was made to the law or to the election held under it; for it appeared that out of 383 votes cast 376 were for and 7 against the subscription.) The court held that the road was sufficiently designated, and that the sheriff was not liable in trespass.

McPike v. *Pen*, 51 Mo. 63, was similar to the above in its sub-

stantial facts, except that the subscription was to a plank road company, and that the sheriff was enjoined from selling under his levy instead of being sued in trespass. The equity for injunction was based on two grounds. 1st, that the proceedings under which the stock was subscribed were so irregular as to vitiate the assessment of the tax *in this:* that the order for the special election, made by the county court, provided for no notice of the election and that no sufficient notice was in fact given. 2d, that the collector had no right to collect it by levy upon real estate. It appearing in evidence that a proper notice was not directed by the order, or given as required in the general election law, the court held the subscription illegal because of notice of election not being given, and also sustained the point as to levy on real estate and made the injunction perpetual. But this case is certainly not relevant to the point in controversy here.

State v. *Cunningham*, 51 Mo. 479, was an indictment for stealing a railroad bond issued by a county for and on behalf of a township of said county, alleged in the indictment to be the property of the county. It was moved to quash the indictment because the bond was not the property of the county as appeared from the face of the bond and indictment. The court *held*, that the county might be the owner of it for the purposes of the indictment, and whether so or not would depend upon facts to be developed at the trial, and reversed the judgment of the lower court which sustained the motion to quash.

State v. *Sanderson*, 54 Mo. 203, really decides nothing, since it was dismissed for want of proper parties. Some constitutional objections were suggested (but not the inconsistency of the Act of 1868, Township Aid Act, with the constitution), but none of them was passed upon by the court.

Rubey v. *Shain*, 54 Mo. 207. This was a suit against the collector of Macon county to recover back $50 paid by plaintiff on an assessment against his property levied by the county court to pay a subscription to a railroad company by the township of Hudson in said Macon county. It appeared in evidence that the railroad company was not organized at the time of the subscription. The court *held*, that the legislature limits the power to subscribe "to railroad companies duly organized under some law of this state," and that the law in this case gave the township no power to subscribe stock to a corporation which had no existence, and that the subscription was

void. The collector was, however, held not liable on other grounds. This case decides nothing, except that a subscription cannot be made to a company not in existence.

State v. *County Court Bates County*, 57 Mo. 70, only involved this question: A township in Bates county had voted a subscription to a railroad company, pursuant to an order of election by the county court, but before an order of subscription was made by the said court the road was completed through the township, and the county court refused to make the subscription, apparently on the ground that the railroad had been completed without asking for the subscription and that the law only authorized *aid to be given in building*. The court reversed the judgment of the lower court (which was in favor of the railroad company) and dismissed the petition, on the ground that the company were invested with no legal interest by the result of the election, as no subscription was made by the county or accepted by the company. There was no question made or decided as to the constitutionality of the law under which this election was held, and it was plain there was no liability under the law even supposing it valid.

State v. *Clarkson*, 59 Mo. 149, is substantially the same as 51 Mo. 479, being on an indictment and involving the question of ownership of bonds, or property in them, by the county.

State v. *Daviess County Court*, 64 Mo. 31, decided but a single point, whether the non-compliance with certain conditions upon which the subscription was based affected the rights and liabilities of either party. The court held the conditions to be the basis of the subscription, and as it was admitted they had not been complied with, the county was not bound to make the subscription. This, like the case in 57 Mo. 70, did not involve the consideration of the statute, since the contract itself was violated upon which the contemplated subscription was based.

State v. *County Court Cooper County*, 64 Mo. 170, was an application directly to the Supreme Court for mandamus to compel the county court to pay interest on township bonds issued to a railroad company. Without examining the merits of the application the court denied the writ on the ground that the trial courts were open to the parties, and to grant this would give an advantage and privity in point of time on the docket to which the applicants were not entitled.

It thus plainly appears from this review of the cases that in no

one of them was the question decided in *Cass County* v. *Johnson*, even "incidentally" involved. But it is claimed that *State* v. *Linn County Court*, 44 Mo. 504, decides the precise point or at least that it is necessarily involved in the decision. Let us see briefly what this case is: A township of Linn county (it is alleged) petitioned the county court to order an election for a vote on a subscription to a railroad company upon certain terms and conditions. The order was made and the election was held, and more than two-thirds of the qualified voters of the township *voting at the election*, voted for the subscription, and the court made the subscription pursuant to the terms and conditions set forth in the petition. Subsequently the railroad company requested the court to issue and deliver the bonds under the terms and conditions of said subscription. The court refused to deliver the bonds, for the reason that the act under which the subscription was made (Township Aid Act of 1868) was unconstitutional and void upon the following grounds:—

1. Because the bonds which it sought to compel the county to issue under the provisions of the act *would be an indebtedness of the county* and not of the township, and that it is, *therefore*, in direct antagonism with section 14, art. 11 of the state constitution, which declares: "The General Assembly shall not authorize any county, city or town to become a stockholder in, or loan its credit to any company, association or corporation unless two-thirds of the qualified voters of such county, city or town, at a regular or special election to be held therein, shall assent thereto."

2. That the act is unconstitutional for the reason that, in providing for the payment of the principal and interest on such bonds as may be issued, it requires that real estate only shall be taxed, thereby exempting all other species of property, for which reason it is in violation of the 11th article of the constitution, which declares "No property, real or personal, shall be exempt from such taxation except such as may be used exclusively for public schools, and such as may belong to the United States, to this state, to counties, or to municipal corporations within the state." The court held that the act was not in violation of the constitution *upon either of these grounds*. No other objection to the act was made or suggested by the pleadings or on the trial, and the case is an authority only upon these points. It is not denied that the court might itself have declared the law unconstitutional on other grounds without regarding the fact that such other grounds were not urged

(as the Supreme Court of the United States did in the case of *Harshman* v. *Bates County*), but it did not do so, either expressly or impliedly. But it can hardly be said that because the court overruled the constitutional objections made, that therefore it considered and anticipated all possible constitutional objections and overruled them; nor is it usual for courts to say that a particular statutory provision is constitutional, that is not questioned.

It is therefore palpable that the question of the provision as to qualified voters, being in conformity with the constitution, was neither made, considered, decided, or even thought of in this case, and that the case is not even relevant as an authority in support of the decision in *Cass County* v. *Johnson*.

It has thus been shown (as we think) that the Supreme Court of the United States has not been consistent in these decisions with itself, and in *Cass County* v. *Johnson* has not been consistent with the Missouri decisions which it professes to follow.

The attempt at criticism of a court so eminent, and whose decisions are entitled not only to respect but reverence, ordinarily, may be considered the more pardonable if not entirely justifiable, in view of the fact that in this case the provision of the state constitution is practically subverted by indirect means, under the plea (shown to be without foundation) of being bound by the state decisions. And inasmuch as this court has, by its decisions in these railroad bond cases, virtually cut off all defence except such as arises out of the *want of power*, and even as to these has gone to the verge of the line attempted to be made by constitutional and statutory restriction—as for instance, by holding that where the power to issue bonds is given upon a condition that the public officers can bind the county or municipality by the false recitals in such unauthorized bonds, if issued by the officers intrusted by the statute or constitution with the power (16 Wall. 644), and that the purchaser may implicitly rely upon the recital in the bonds made by the proper officer that the authority to issue them has arisen, and that he is under no obligation to consult the record, and is not charged with constructive notice of their contents (*Marcy* v. *Township Oswego*, 3 Central Law Journal 389)—such views have provoked the powerful dissent of such members of the court as MILLER, DAVIS, FIELD and BRADLEY, and evoked urgent and pointed remonstrance from so conservative a mind as Judge DILLON'S, whose opinion is well regarded as equal in weight to judicial decision.

The present seems a fit time to challenge, "To the law and to the testimony" in bonds as well as in other things. And if the court has justified its boast that it would "never immolate truth and justice," it may well be doubted whether it has not "immolated the law" in the application of its principles to these cases.

JAMES F. MISTER.

KANSAS CITY, Missouri.

RECENT ENGLISH DECISIONS.

High Court of Justice of England. Court of Appeal.

DICKSON ET AL. v. REUTER'S TELEGRAPH COMPANY.

The defendants, a telegraph company, through the negligence of their servants, delivered to the plaintiffs a message which was not intended for them. The plaintiffs, who reasonably supposed that the message came from their agents and was intended for them, acted upon it and thereby incurred a loss: *Held*, affirming the decision of the Common Pleas Division, that the plaintiffs could not maintain any action against the defendants upon the ground of their negligence, or of an implied representation by them that the message was sent by the plaintiffs' agents.

APPEAL from the judgment of the Common Pleas Division in favor of the defendants on demurrer to the statement of claim, which alleged that the plaintiffs were merchants at Valparaiso, and were a branch house of the firm of Dickson, Robinson & Co., of Liverpool; the defendants were a telegraph company having their chief offices in London, and agencies in Liverpool and in various parts of the world, including South America. The defendants had a system of forwarding in one "packed" telegram the messages of several senders, each message being distinguished and headed by a registered cipher known to the defendants and their agents and also to the senders, which messages, on receipt of the packed telegrams by the defendants' agents, were transmitted to the proper recipients. Previous to December 1874, Dickson, Robinson & Co. were in the habit of sending messages to the plaintiffs through the defendants' company, and were instructed by the defendants to head the messages by a registered cipher word indicating that the messages were intended for the plaintiffs. On the 26th of December 1874 the plaintiffs received at Valparaiso a telegraphic message, which they understood and reasonably understood, to be a direction from Dickson, Robinson & Co. to ship barley to England; but the message was not in fact intended for the plaintiffs. The mis-deli-